IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 371

BESSIE LASKY AND JESSE L. LASKY, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

The Brief for Respondent points out that Lasky has been deprived of his right of appeal due to oversight or mistake of counsel and through no fault of his own. As a result, all his property, including his home, is tied up by tax liens. This property is not sufficient to pay the tax claim determined by the Tax Court. His case is meritorious and he should have a reasonable chance of prevailing if heard on the merits on

appeal. He is now 76 years old. Justice demands that he be given the right to prosecute his appeal before he is stripped of all his wordly goods. The cases cited herein and in petitioners' original brief show that this Court has the power to reverse. It should exercise that power.

This is a case of first impression, so far as this Court is concerned. It has never passed upon the power of the Tax Court, as a trial court, to vacate a decision out of time for cause shown.

The original Brief of the petitioners demonstrates that the Tax Court is a Court. The Government admits this is so, stating: "* * * the Tax Court is clearly not an administrative agency in the conventional sense. In structure and function, as well as in name, it operates as a judicial body." (Brief for Respondent, p. 16) As a Court, it should be permitted, within its discretion, to grant rehearings, or take other action within the province of a trial court in order to accomplish justice.

Petitioners feel that trial courts have broad discretionary power in situations such as the one here involved. The modern trend is illustrated by Rule 60 (b), Federal Rules of Civil Procedure. (Original Brief, p. 26)

This Court has taken a liberal view in interpreting Rule 60 (b), as is illustrated by *Klapprott* v. *United States*, 335 U.S. 601. In that case, it is said (p. 614-615): "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to

enable them to vacate judgments whenever such action is appropriate to accomplish justice."

Lower courts have interpreted the "excusable neglect" clause to cover situations where action, or failure to act, by counsel resulted in injustice to the client. Thus, in *Barber* v. *Turberville* (App. D.C. 1954), 218 F. (2d) 34, counsel for defendant failed to file an answer "because the complaint became mixed with another file." The Court of Appeals said this was excusable neglect and set aside the default judgment. The many cases cited under Rule 60 (b), U.S.C.A. show a liberal construction. This is well expressed in *Standard Grate Bar Co.* v. *Defense Plant Corporation* (D.C. Pa. 1944), 3 F.R.D. 371, as follows:

> "* * * Powers vested in the trial courts by Rule 60 (b) should be liberally exercised in order that cases may be disposed of upon their merits, and parties claiming in good faith to have a substantial defense to an action should be given an opportunity to present it."

The Government's Brief is predicated primarily upon the contention that the literal language of the statute must be followed. It says that this Court has no power to follow the established rules of judicial construction and to interpret the word "final" in the light of such rules. This position is taken despite repeated decisions of this Court and other Courts which deviate from the literal language of statutes and exercise discretionary power.

Typical of the many cases involving the inherent discretionary power of a Court to interpret a jurisdictional statute and deviate from literal language is

United States v. *California Eastern Line, Inc.,* (1955) 348 U.S. 351. The Renegotiation Act of 1942 provides that Tax Court determinations of excess profits "shall not be reviewed or redetermined by any court or agency." Despite this specific language, this Court, on the urging of the Government, reversed the decision of the Court of Appeals for the District of Columbia, which had held that it lacked jurisdiction to review a Tax Court decision holding that California Eastern Line had no renegotiable contract.

The Ninth Circuit in *Helms Bakeries* v. *Commissioner,* (1956) 236 F. (2d) 3, accepted jurisdiction and remanded an excess profits tax relief case under § 722 (b) (4), Internal Revenue Code of 1939, to the Tax Court, despite the provision in § 732 (c) of that Code which states that Tax Court decisions in such cases shall not be reviewed or redetermined by any court or agency except the Tax Court. The reasoning of the Ninth Circuit was that the decision of the Tax Court was contrary to its findings of fact and that the Tax Court had made no finding on a material issue.

Another decision of this Court, closely akin to the case at bar, is *Industrial Addition Association* v. *Commissioner,* (1945) 323 U.S. 310. In that case, the taxpayer had filed no tax return. It lost before the Tax Court and appealed to the Sixth Circuit when, under the statute, it should have appealed to the Court of Appeals for the District of Columbia. After the three-month period for appeal had expired, the parties stipulated that the case be heard by the Sixth Circuit. The Court of Appeals dismissed the case for lack of jurisdiction (141 F. (2d) 636) reasoning that no proper

petition for review had been filed within the three-month period and that the parties, by stipulation, could not, after the lapse of the three-month appeal period, stipulate venue. This Court reversed.

Other illustrations of a Court's power to disregard literal language are legion. For instance, *Dickinson* v. *United States,* (1953) 346 U.S. 389, involved the construction of the Universal Military Training and Service Act. That Act provides that classification orders of Draft Boards shall be "final". Despite this limitation on review, this Court actually did review the facts and reversed the Court of Appeals which had decided it lacked jurisdiction.

The purpose of citing the above cases is to demonstrate that, in situations where courts are specifically denied jurisdiction to exercise any review, a way to do substantial justice and to grant reviews has been found in meritorious cases. It would seem that the rule should be less harsh where appellate review with time limitations is specifically provided, than in the cases cited where all review is denied by statute.

A case involving the power of a Court to grant appellate review when the time for appeal had expired, is *Hill* v. *Hawes,* (1944) 320 U.S. 520. In that case, the United States District Court for the District of Columbia filed a judgment dismissing the complaint. The Clerk noted the judgment in the docket. The Rules of Civil Procedure imposed on the Clerk the duty, immediately upon the entry of the judgment, to send notice of such entry, but he did not do so. After the period for appeal had expired, the petitioner filed a motion with the District Court asking it to enter

judgment and to direct the Clerk to notify the parties. The District Court vacated the first judgment and entered a new judgment, with instructions that the Clerk notify the parties. Appeal was taken from the second judgment. The Court of Appeals for the District of Columbia dismissed the appeal for lack of jurisdiction. This Court reversed. The Court pointed out that the "term had not expired and the judgment was still within the control of the trial judge for such action as was in the interest of justice to a party to the cause."

There are innumerable cases in which courts have followed established rules of interpretation and deviated from the literal limitation on the appeal period. If the Tax Court decides a case and either party files a motion for a new trial or reconsideration, the time for appeal begins to run from the date of the disposition of the motion. This is true, even though the original decision is not changed and the statute says that appeal must be taken within three months from the date of the decision. In other words, the literal language of the statute is not followed and the decision does not become final upon the expiration of three months from the date of the decision. (See pages 30, 31 original Brief)

R. Simpson Company v. *Commissioner*, (1944) 321 U.S. 225, is the principal authority urged by the Government. In the *Simpson* case, established rules of judicial interpretation were followed part way. The statute states that a Tax Court decision becomes final "upon the denial of a petition for certiorari." The majority of the Court held that the decision did not become final upon the denial of the certiorari but upon

the expiration of the twenty-five days provided in the rules for filing petitions for rehearing. Mr. Justice Douglas, with whom Mr. Justice Murphy and Mr. Justice Rutledge concurred, dissented on the ground that the decision rested upon the Court's rule-making power and that the Court could grant petitions for rehearing at any time during the term. The reasoning of Mr. Justice Douglas seems logical because, under the Court's own rule, the time for filing a petition for rehearing may be shortened or enlarged by the Court, or a Justice thereof. It should be mentioned that, since the *Simpson* case, Sec. 452, Title 28, United States Code, has been amended to provide "The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding."

The *Simpson* case, as well as the *Northern Coal Company* case (1934) 293 U.S. 191, deals with the power of this Court to grant rehearings of denials of certiorari. The case at bar presents the first case considered by this Court dealing with the power of the Tax Court, as a trial court, to vacate a decision out of time for cause shown.

The law has always been that "* * * it is always in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it." *United States* v. *Breitling*, 20 Howard (61 U.S.) 252, 254.

Confusing statements are made at pages 22 and 26 of Respondent's Brief when it is said that the Commissioner is prohibited from making an assessment until a decision of the Tax Court has become final. Section 272 (a) (1) of the 1939 Code so provides, but

Section 1145,[1] 1939 Code, states that if a taxpayer appeals a Tax Court decision and does not file a bond approved prior to taking the appeal, the tax may be immediately assessed. In most appealed cases handled by counsel for petitioners, no bond is filed. Consequently, the tax is assessed and paid long before the decision becomes "final". This means that the revenue is fully protected when appeal is taken from a Tax Court decision because (1) a bond must be filed, or (2) if no bond is filed, the tax may be immediately assessed and collected. In addition, if the Commissioner believes the assessment or collection of a deficiency will be jeopardized by delay, he may assess and collect the deficiency at any time[2] except after a

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[1] Section 1145, Internal Revenue Code, 1939:

Bond to stay assessment and collection.

Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, the review under section 1142 shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Tax Court unless a petition for review in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed, has filed with the Tax Court a bond in a sum fixed by the Tax Court not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Tax Court, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under the income or estate tax laws. * * *

[2] Sec. 273 (a), Internal Revenue Code, 1939:

Jeopardy assessments

(a) Authority for making. If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

taxpayer has filed an appeal from a decision of the Tax Court.

Respectfully submitted,

ROBERT ASH
CARL F. BAUERSFELD
1921 Eye Street, N.W.
Washington 6, D.C.
Attorneys for Petitioners.

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